Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

S&P COMPANY,

Petitioner,

v.

ANALEE YORKSHIRE and
INTERNAL REVENUE SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Income tax returns and tax return information possessed by the Internal Revenue Service "shall be confidential" and shall not be disclosed "except as authorized by this title." *See* 26 U.S.C. § 6103(a). A shareholder owning 1% or more of the stock of a corporation may obtain disclosure of the tax return of "such corporation or subsidiary thereof." 26 U.S.C. § 6103(d)(1)(D)(iii).

When a parent and its affiliated subsidiary corporations file a single consolidated income tax return on behalf of all of the affiliated corporations, may a 1% shareholder of an affiliated subsidiary obtain from the Internal Revenue Service disclosure of the parent company's entire consolidated return?

RULE 29.1 STATEMENT

Petitioner, S&P Company, is a privately held corporation. The stock of S&P is owned 50% by a testamentary trust established by the late Paul Kalmanovitz and 50% by the estate of the late Lydia Kalmanovitz. The ultimate, intended, beneficial owner of all of the stock is the Kalmanovitz Charitable Foundation.

S&P Company's active subsidiaries are Keller Street Development Company, the Pearl, Falstaff, General, Walter and Pabst Brewing Companies, Enterprise Advertising Agency, Texas Transportation Company, and Tumwater Valley Development Co.

Neither the stock of S&P Company nor that of any subsidiary is publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

S&P Company ("S&P") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW*

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 26 F.3d 942 (1994). It is

*Unless otherwise indicated, all statutory citations are to the Internal Revenue Code, Title 26, United States Code.

reprinted in the Appendix to this Petition at App. 1, *et seq.* On July 11, 1994, the Ninth Circuit denied S&P's Petition for Rehearing and Suggestion of Rehearing *En Banc*. The Order denying rehearing and rehearing *en banc* is reprinted at App. 16.

In the district court, the case was referred to a magistrate judge. The district judge adopted the magistrate judge's report and recommendation without modification by order entered on June 14, 1993. This order of the district judge appears at App. 18. The report and recommendation that the district judge adopted was filed on May 19, 1993. It is published at 829 F.Supp. 1198 (1993) and reprinted at App. 26.

JURISDICTION

On June 8, 1994, the United States Court of Appeals for the Ninth Circuit filed its opinion affirming the district court in all respects. S&P filed a timely petition for rehearing and suggestion of rehearing *en banc* on June 22, 1994. The court of appeals denied the petition on July 11, 1994.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is 26 U.S.C. § 6103, which provides in relevant part:

§ 6103. Confidentiality and disclosure of returns and return information

(a) General rule. – Returns and return information shall be confidential, and except as authorized by this title –

* * *

(b) Definitions. – For purposes of this section –

(1) Return. – The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information. – The term "return information" means –

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the

determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, . . .

* * *

(e) Disclosure to persons having material interest. –

(1) In general. – The return of a person shall, upon written request, be open to inspection by or disclosure to –

* * *

(D) in the case of the return of a corporation or a subsidiary thereof –

(i) any person designated by resolution of its board of directors or other similar governing body,

(ii) any officer or employee of such corporation upon written request signed by any principal officer and attested to by the secretary or other office,

(iii) any bona fide shareholder of record owning 1 percent

> or more of the outstanding stock of such corporation,. . . .

STATEMENT OF THE CASE

Petitioner is the parent of a number of related and affiliated corporations, including Keller Street Development Company ("Keller"). These affiliated corporations filed consolidated tax returns for the years 1987 through 1990.[1]

Respondent Analee Yorkshire, plaintiff below, owns 1.07% of Keller's outstanding common stock. App. 27. She does not own any stock of S&P or any of the other corporations within the S&P affiliated group.

Yorkshire lodged with the IRS a request for disclosure of the consolidated tax returns filed on behalf of S&P, Keller and the other S&P affiliates for the years 1987 through 1990. She also sought disclosure of portions of the IRS administrative file related to the tax returns in question. The IRS initially refused to produce the tax

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[1] The consolidated returns for the years in question were filed on behalf of S&P, Keller, Pearl Brewing Company, General Brewing Company, and Pearl Container Company. App. 27.

Under § 1501, an affiliated group of corporations may file a consolidated tax return in lieu of filing separate returns. Section 1501 provides in pertinent part:

> An affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns.

returns and tax return information sought by Yorkshire. App. 5-6, 28 & n.1.

Accordingly, Yorkshire filed suit in the District Court for the Central District of California under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B).[2] She sought an order compelling the IRS to produce the consolidated income tax returns and tax information withheld by the IRS. App. 5-6.[3]

Yorkshire asserted that her status as a shareholder owning more than 1% of the outstanding stock of Keller entitled her to obtain the entire consolidated return covering S&P and all of S&P's affiliates, including Keller. App. 28. Yorkshire asserted a right of federal disclosure based on § 6103. Under § 6103(a), the IRS may not disclose "tax returns" or "taxpayer information" "except as authorized by this title." An exception to this general rule permits disclosure to "any bona fide shareholder of

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[2] The relevant portion of FOIA provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

[3] Yorkshire also sought from the IRS disclosure of the 1989 tax return of the Pearl-Falstaff Joint Participation Partnership, a partnership owned by S&P subsidiary corporations other than Keller. The IRS refused to disclose this partnership tax return. Accordingly, Yorkshire included in her federal complaint a demand for production of this partnership return as well. App. 5-6.

record owning 1 percent or more of the outstanding stock of such corporation." *See* § 6103(e)(1)(D)(iii). Yorkshire claimed that she fell within this exception. App. 28.

Yorkshire's suit was referred to a magistrate judge on the district court's apparent initiative. Yorkshire and the IRS filed separate motions for partial summary judgment addressing the question whether Yorkshire was entitled to receive the consolidated returns and related tax information. After the respective motions were filed, the IRS agreed to disclose to Yorkshire the consolidated returns. These parties also agreed to a procedure to be used to determine what other IRS documents, beyond the consolidated returns themselves, should also be disclosed. App. 6, 28 & n.1.

On April 13, 1993, S&P was granted leave to intervene to oppose disclosure of S&P's consolidated tax returns and return information. S&P thereupon filed an opposition to the pending motions for partial summary judgment. Additionally, S&P submitted its own motion for summary judgment. App. 6.

On May 19, 1993, the magistrate judge filed a report recommending that Yorkshire, as a shareholder of Keller, was entitled to obtain S&P's consolidated returns and return information from the IRS pursuant to § 6103(e)(1)(D)(iii). App. 26. One factual predicate for the magistrate judge's decision is that information about Keller contained in the consolidated returns cannot be separated from information in the returns concerning the other corporate entities. App. 31 & n.2.

On May 21, 1993, the magistrate judge's report and recommendation was served by the clerk of the district

court. App. 22. S&P filed timely objections to the report on June 1, 1993.[4]

On June 14, 1993, the district judge adopted the magistrate judge's report in full. The district judge ordered the IRS to disclose S&P's consolidated tax returns to Yorkshire within ten days. App. 18. In a separate order filed June 14, the district judge refused to stay pending appeal the order directing the IRS to produce the tax returns.

On June 18, 1993, S&P filed a notice of appeal from the June 14, 1993 order.[5] A motions panel of the Ninth Circuit stayed pending appeal the district court order directing turnover of the tax returns.

The Ninth Circuit affirmed in a published opinion filed on June 8, 1994. The principal part of the opinion, and the only part that petitioner deems relevant in this Court, is the holding that S&P's consolidated income tax returns must be disclosed to a shareholder of S&P's subsidiary, Keller. App. 9-12.

For the sake of completeness, three other aspects of the Ninth Circuit's opinion warrant brief mention. First,

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[4] S&P had ten days within which to object, excluding weekends and holidays. *Compare* Fed.R.Civ.P. 72(a) (objections within ten days) *with* Fed.R.Civ.P. 6; *Tushner v. U.S. District Court*, 829 F.2d 853 (9th Cir. 1987) (weekends and holidays are excluded from ten-day time calculations).

[5] Yorkshire filed at a later time a cross-appeal challenging the portion of the district court's order refusing disclosure of the partnership tax return discussed at note 3, *ante*. This subject is discussed in the court of appeal's opinion under topic heading III, App. 12, *et seq.*

the Ninth Circuit recognized it own appellate jurisdiction under 28 U.S.C. § 1291 and § 1292(a)(1). App. 5; *see also In re Steele*, 799 F.2d 461 (9th Cir. 1986). No litigant contested appellate jurisdiction. Second, the court held that S&P was properly allowed to intervene as of right under Fed.R.Civ.P. 24(a). App. 7-9. The IRS has never opposed S&P's intervention. Yorkshire contested intervention throughout the case, including on appeal. Third, the court rejected Yorkshire's argument that the district court lacked federal jurisdiction. Yorkshire's argument was based on the premise that jurisdiction over S&P depended on the doctrines of pendent or ancillary jurisdiction. The Ninth Circuit found these doctrines inapplicable. App. 9 & n.4. For its part, the IRS consistently took the position that the district court had jurisdiction over the case and over S&P as an intervenor.

After rendering decision and denying rehearing, the Ninth Circuit initially stayed its mandate. Later, the court of appeals dissolved the stay of mandate. As of this writing, the tax returns at issue have not been disclosed by the IRS.

REASONS TO GRANT THE WRIT

A. The Legal and Factual Environment Surrounding the Question Presented by This Case

Section 6103(a) provides that tax returns and tax return information are presumptively confidential. The presumption of confidentiality is overcome when a statutory provision authorizes disclosure. Narrowly drawn

statutory exceptions allow the IRS to disclose tax information to those persons having a "material interest" in the information. *See* § 6103(e). Certain shareholders of a corporation have the requisite "material interest," which is defined thus:

> (D) In the case of a return of a corporation or a subsidiary thereof –
>
> * * *
>
> (iii) any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation.

Section 1501 allows an affiliated group of corporations to file a single consolidated return on behalf of all of the affiliated corporations. By joining in a consolidated return, individual corporations in the affiliated group need not file separate returns. Consolidated tax returns are filed in order to achieve economic advantages. They can be used to offset the gains of one affiliated corporation against the losses of another. They can be used to reduce taxes that might otherwise be owed on intercompany transactions among the members of the affiliated group. *See generally* App. 10-11. The decision to file a consolidated tax return is a lawful exercise of economic self-interest.

> Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, J.).

This case sits at the junction between § 1501 and § 6103. What to do? The junction was wholly unforeseen

by Congress. The two statutes contain no intersection. The election to file a consolidated return does not trigger any change of consequences under § 6103. The statute, the legislative history, and the implementing regulations do not specifically address the issue presented by this case.[6]

A consolidated return is by nature the return of more than one corporate taxpayer. In this case, Yorkshire has a "material interest" sufficient to allow disclosure of tax information about one corporate taxpayer only, Keller. However, that corporate taxpayer's information is intermixed with information about others as to whom there is no claim that any "material interest" would authorize disclosure. The tax information about the various taxpayers who joined in the consolidated returns cannot be segregated. App. 31 & n.2.

B. The Decision of the Court of Appeals Is Inconsistent with a Decision of This Court, Decisions of Other Circuits, and Plain Wordings of the Congressional Statute at Issue

The lower courts favored disclosure of more than one taxpayer's return to a shareholder of only one of the

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[6] There are no IRS regulations governing the situation at hand. The magistrate judge made note in his report of an IRS publication entitled Internal Revenue Manual, Administration, Disclosure of Official Information, §§ 241-42 (May 31, 1991). *See* App. 32. The manual is not a regulation or other officially promulgated interpretation of § 6103. Therefore, it is not given any special deference by the courts. *See Stubbs, Overbeck & Assoc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971). The handbook is only a lawyer's effort to apply § 6103. As such, it resembles a brief. A court's *de novo* examination of the manual will prove the manual either right or wrong.

taxpayers. This result diminishes the confidentiality rights of the other taxpayers who joined in the return. This result merits this Court's review.

1. The court of appeals' decision is inconsistent with interpretations of § 6103 announced by this Court and by other circuit courts. In *Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9 (1987), this Court identified a primary purpose of § 6103 as "limiting access to tax filings." *Id.* at 16; see also *id.* ("One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than [the IRS]."); S. Rep. No. 94-938, p. 318 (1976), U.S. Code Cong. & Admin. News 1976, pp. 2897, 3747 ("returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103").

Other circuits consistently declare "confidentiality" as the primary purpose of § 6103. These circuits label "confidentiality" as a presumptive status to be accorded to tax information. Confidential status ends under these decisions only when plain statutory language authorizes disclosure of tax information.[7]

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[7] *See, e.g., Aronson v. Internal Revenue Service*, 973 F.2d 962, 964 (1st Cir. 1992) (Section 6103 "lays down a basic rule of confidentiality" and forbids the IRS to disclose any tax return or return information except under the "narrowly drawn" exceptions); *United States v. Richey*, 924 F.2d 857, 861 (9th Cir. 1991) (noting that the governmental interest in retaining the confidentiality of tax information has two components: (1) to ensure compliance with federal tax laws; and (2) to ensure each taxpayer's right to privacy); *Wiemerslage v. United States*, 838 F.2d

The Ninth Circuit's analysis is inconsistent with these decisions, which are themselves rooted in the plain meaning of subpart (a) of § 6103. The plain wording of § 6103 does not authorize disclosure of the tax return of one corporation to the shareholder of another. The presumption of confidentiality should remain undisturbed.

The right of confidentiality runs in favor of *each individual* taxpayer. Nothing in § 6103 allows one taxpayer's privacy rights to be disregarded or ignored when analyzing whether a return should be disclosed. Congressional action codified the *individuality* of the privacy right in § 6103. In 1976, Congress *strengthened* the privacy rights in § 6103 by protecting "return information" about each taxpayer in whatever form kept by the IRS. *Church of Scientology*, 484 U.S. at 16. Thus, even if S&P's consolidated return is in some sense Keller's "return," discloseable to Keller shareholders, such an analysis is incomplete. S&P's "return information" is separately protected by a mantle of privacy. The presumption of confidentiality under § 6103 cannot be overcome unless a statutory right of access to tax information about each taxpayer is established.

899, 902-03 (7th Cir. 1988) (finding that Congress intended § 6103 to be a general prohibition against the disclosure of tax return information unless expressly authorized by statute and noting "the precision with which the entire section is drafted."); *Lampert v. United States*, 854 F.2d 335, 336 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989) (section 6103 is designed to protect the flow of information between taxpayers and the IRS by controlling the disclosure of tax information by government employees).

The Ninth Circuit's decision is inconsistent with the plain language of § 6103 in at least one other respect. Section 6103(e)(1)(D) authorizes disclosure of a corporation's tax return to a one-percent shareholder of "such corporation" or "a subsidiary thereof." This statutory language envisions the situation where a shareholder of one corporation may obtain tax returns of other corporations. The statute forges a downward hierarchy of disclosure. A shareholder may obtain tax returns of the corporation that issued her stock and the subsidiaries of that stock-issuing corporation. The Ninth Circuit's decision is upside down. An upward hierarchy of disclosure has been adopted: a shareholder of a subsidiary may obtain the parent corporation's consolidated tax return.[8]

2. The reasoning deployed by the court of appeals in reaching its decision is fundamentally unsound. The Ninth Circuit relied on the consensual nature of the taxpayers' decision to file a consolidated return. App. 12. It is true that each corporation subscribing to a consolidated return must agree to filing in this form. *See* § 1501. But there is no evidence, much less a finding, that any taxpayer acted in this case for any reason other than tax minimization. The critical point, overlooked below, is this: taxpayers who elect to file a consolidated return do not thereby waive their privacy rights.

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[8] Other anomalies emerge from the Ninth Circuit's interpretation. A shareholder of the parent corporation, S&P, may own 9/10% of S&P's stock. Such a shareholder is not entitled to obtain the S&P consolidated tax return. In contrast, a shareholder of a subsidiary with a much smaller economic stake in the overall enterprise is granted tax return access.

In any event, the court of appeals disregards the statutory language when it extrapolates a loss of privacy protection based on the taxpayers' election to file a consolidated return. The statute expressly protects "return information" regardless of whether the information is "recorded by, prepared by, furnished to, or collected by the [IRS]." *See* § 6103(b)(2)(A).[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: September 30, 1994

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[9] Section 6103(e)(7) authorizes access to "return information":

> **(7)** Return information. Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

Subpart (e)(7) must be read on a taxpayer-by-taxpayer basis.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Analee Yorkshire, *Plaintiff-Appellee,* v. United States Internal Revenue Service, *Defendant-Appellee,* v. S & P Company, *Intervenor-Appellant.*	No. 93-55835 D.C. No. CV-92-06153-MRP
Analee Yorkshire, *Plaintiff-Appellant,* v. United States Internal Revenue Service, *Defendant-Appellee,* v. S & P Company, *Intervenor-Appellee.*	No. 93-55932 D.C. No. CV-92-06153-MRP OPINION

Appeal from the United States District Court for the Central District of California Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
February 2, 1994
Pasadena, California

Filed June 8, 1994

6155

Before: Thomas Tang, Harry Pregerson, and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Tang

SUMMARY

Tax/Corporations/Tax Returns

The court of appeals affirmed a district court order. The court held that a shareholder had a right to disclosure of a corporation's tax returns, even though the returns were consolidated with those of other members of the corporation's affiliated group.

Appellant S&P Co., Keller Street Development Co., Pearl Brewing Co., and Pearl Container Co. are all members of the same affiliated group. They filed consolidated tax returns for the years 1987 through 1990. Appellee Analee Yorkshire, a more than one percent shareholder in Keller, sought disclosure of Keller's consolidated tax returns for the years 1987 through 1990. She also sought disclosure of the 1989 tax return of Pearl-Falstaff, a partnership owned by S&P subsidiaries Pearl Brewing and Falstaff Brewing.

Appellee Internal Revenue Service (IRS) refused to disclose the tax returns to Yorkshire. Yorkshire filed a complaint in the district court under the Freedom of Information Act, seeking an injunction to compel disclosure. The complaint was premised on Yorkshire's statutory right, as a more than one percent Keller shareholder, to disclosure of Keller's consolidated tax returns. S&P sought leave to intervene to protect its interest in the confidentiality of the consolidated returns. A magistrate judge granted S&P leave to intervene.

The magistrate concluded that Yorkshire was entitled to disclosure of Keller's returns, but not to disclosure of Pearl-Falstaff's. The district court adopted the magistrate's report and recommendation.

Yorkshire appealed, contending that S&P should not have been allowed to intervene because it lacked an interest in Keller's consolidated tax returns. Yorkshire also contended that the district court erred in holding that she was not entitled to disclosure of Pearl-Falstaff's return; she argued that the return was a "supplement to" the affiliated group's consolidated return. S&P appealed the order of disclosure of Keller's consolidated tax returns, contending that its right to tax return confidentiality trumped Yorkshire's right to disclosure of Keller's returns.

[1] Because S&P and Keller filed consolidated tax returns, disclosure of Keller's returns in effect would disclose S&P's returns. Thus, S&P's interest in the confidentiality of its own tax returns was a sufficient interest for intervention as of right.

[2] S&P's decision to file consolidated tax returns was made for its own convenience and financial benefit; Yorkshire's right to disclosure of Keller's tax return was not sacrificed thereby. Accordingly, the district court's order of disclosure of Keller's consolidated returns was affirmed.

[3] Neither Yorkshire nor Keller is a Pearl-Falstaff partner. Any interest Yorkshire possessed in the Pearl-Falstaff return was merely derivative of her status as a one percent Keller shareholder, and did not entitle her to disclosure. [4] Pearl-Falstaff's return was not a "supplement to" Keller's consolidated return. Therefore, the district court's order enjoining the IRS from disclosing Pearl-Falstaff's return to Yorkshire was affirmed.

COUNSEL

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Kevin M. Brown, Esq., Washington, D.C., for the defendant-appellee.

Thomas M. Peterson, Esq., San Francisco, California, for the intervenor-appellant-appellee.

OPINION

TANG, Senior Circuit Judge:

Analee Yorkshire as a more than one percent Keller shareholder sought disclosure of Keller Street Development Company's consolidated tax returns for the years 1987 through 1990 under the Freedom of Information Act,

5 U.S.C. § 552. She also requested disclosure of the 1989 tax return of Pearl-Falstaff Joint Participation Partnership, a partnership owned by separate subsidiaries of the S&P Company, Keller's parent corporation.

S&P Company appeals the district court's order of disclosure of Keller's consolidated tax returns for the years 1987 through 1990. Yorkshire appeals the district court's order enjoining the Internal Revenue Service from disclosing the 1989 tax return of Pearl-Falstaff. Yorkshire also appeals the magistrate judge's order granting S&P leave to intervene. We have jurisdiction under either 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1) and affirm.

BACKGROUND

S&P, Keller, General Brewing Company, Pearl Brewing Company, and Pearl Container Company are all members of the same affiliated group and filed consolidated tax returns for the years 1987 through 1990.[1] Yorkshire sought disclosure of Keller's consolidated tax returns for the years 1987 through 1990, and also of the 1989 tax return of Pearl-Falstaff, a partnership owned by S&P subsidiaries Pearl Brewing and Falstaff Brewing Corporation.[2] She sought

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[1] S&P, the mutual parent of the affiliated group, owns approximately ninety-five percent of the stock of Keller. Yorkshire owns slightly more than one percent of Keller. Keller owns approximately ninety-nine percent of the stock of General Brewing. General Brewing owns approximately forty-five percent of the stock of Pearl Brewing. S&P owns the other fifty-five percent of Pearl Brewing.

[2] Pearl Brewing owns, either directly or through its wholly owned subsidiary Pearl Container, approximately ninety-five

disclosure of the tax returns for use in an ongoing state court action in which she is seeking the dissolution of Keller.

The I.R.S. refused to disclose the tax returns to Yorkshire. Thereafter, Yorkshire filed a complaint in federal district court under the Freedom of Information Act, 5 U.S.C. § 552, seeking an injunction to compel disclosure. The complaint was premised on Yorkshire's statutory right as a more than one percent Keller shareholder to disclosure of Keller's consolidated tax returns under I.R.C. § 6103(e)(1)(D)(iii). S&P sought leave to intervene to protect its interest in the confidentiality of those consolidated tax returns. The magistrate judge granted S&P leave to intervene. Yorkshire did not object to the magistrate judge's order.

All parties involved filed motions for summary judgment. Yorkshire argued that she was entitled to disclosure of all of the relevant tax returns, S&P argued that Yorkshire was entitled to disclosure of none of the tax returns, and the I.R.S. opposed only the disclosure of the Pearl-Falstaff tax return. The magistrate judge concluded that Yorkshire was entitled to disclosure of Keller's consolidated tax returns for the years 1987 through 1990 but not to disclosure of the 1989 tax return of Pearl-Falstaff. Both Yorkshire and S&P objected timely to the magistrate judge's report and recommendation.

The district court granted Yorkshire's motion for summary judgment as to Keller's tax returns and ordered their disclosure. The district court also granted S&P's and

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percent of Pearl-Falstaff. Falstaff Brewing owns the remaining five percent of Pearl-Falstaff.

the I.R.S.'s motion for summary judgment as to the Pearl-Falstaff tax return and enjoined the I.R.S. from its disclosure. The district court's final order adopted the magistrate judge's report and recommendation in its entirety.

DISCUSSION

I. S&P's Intervention[3]

Federal Rule of Civil Procedure 24(a) establishes four requirements for intervention as of right: "timeliness; an interest relating to the subject of the action; practical impairment of the party's ability to protect that interest; and inadequate representation by the parties to the suit." *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990),

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[3] As a preliminary matter, S&P argues that Yorkshire waived her right to appeal the magistrate judge's nondispositive order allowing S&P to intervene when she failed to make objections within ten days after being served with a copy of the order. *See* Fed. R. Civ. P. 72(a) ("Within 10 days of being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made."). Our case law appears to be in conflict on this point. *Compare U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1102-03 (9th Cir. 1985) (holding that a party who fails to object to a magistrate judge's nondispositive order does *not* waive the right to appeal the order); *United States v. Bogard*, 846 F.2d 563, 567 n.2 (9th Cir. 1988) (same) *with McKeever v. Block*, 932 F.2d 795, 798-99 (9th Cir. 1991) (holding that a party who fails to object to a magistrate judge's nondispositive order waives the right to appeal the order); *Palmer v. United States*, 794 F.2d 534, 540 (9th Cir. 1986) (same). However, we need not resolve this conflict. Even if Yorkshire did not waive her right to appeal the magistrate judge's order, the district court properly allowed S&P to intervene.

cert. denied, 111 S. Ct. 2889 (1991). The rule is construed broadly in favor of the applicants. *Id.* A district court's decision concerning intervention as of right is reviewed de novo, except the question of timeliness which is reviewed for an abuse of discretion. *Id.*

Yorkshire's argument against intervention as of right focuses primarily on S&P's lack of interest in Keller's consolidated tax returns. Yorkshire argues that because the I.R.S. could have disclosed Keller's consolidated tax returns to her at the administrative level without ever notifying Keller, S&P or any other member of the affiliated group, Congress must have intended a completely bilateral procedure between the person requesting the information and the I.R.S. Yorkshire's argument is unpersuasive.

[1] It is not a requirement of intervention that the intervenor be entitled to notice in the case in which he or she is seeking to intervene. Moreover, to argue that a taxpayer has no interest in the confidentiality of his or her own tax return contradicts I.R.C. § 6103(a)'s presumption that tax returns and tax return information remain confidential. Because S&P and Keller filed consolidated tax returns, disclosure of Keller's tax returns in effect discloses S&P's tax returns. But for the consolidated tax returns, Yorkshire would have no right to disclosure of S&P's tax returns. Under these circumstances, S&P's interest in the confidentiality of its own tax returns is a sufficient interest for intervention as of right.

Furthermore, because the I.R.S., the only named defendant, did not oppose disclosure of Keller's consolidated tax returns, S&P's interest in the confidentiality of

those tax returns was not adequately represented by the parties to the suit. Clearly, except for intervention, there was no practical alternative avenue for S&P to protect its interest.

Finally, there is no dispute as to the timeliness of S&P's motion for intervention. S&P filed its motion well before the date set for the end of discovery and before the district court ruled on Yorkshire's motion for summary judgment. Yorkshire has not established that she was prejudiced by S&P's intervention.

As such, we conclude that the magistrate judge did not err in granting S&P leave to intervene as it met all four requirements for intervention as of right under Federal Rule of Civil Procedure 24(a). Accordingly, we need not address Yorkshire's argument that the scope of permissive intervention should have been restricted.[4]

II. Disclosure of Keller's Consolidated Tax Returns

Whether Yorkshire is entitled to disclosure of Keller's consolidated tax returns under I.R.C. § 6103(e)(1)(D)(iii) is a question of statutory construction reviewed de novo. *See Williamson v. Commissioner*, 974 F.2d 1525, 1529 (9th Cir. 1992).

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[4] Yorkshire also argues that under 28 U.S.C. § 1367, the court lacked jurisdiction over S&P's claim. Section 1367 codifies the doctrines of pendent and ancillary jurisdiction under the single heading of "supplemental jurisdiction." In this case, S&P does not make a pendent or ancillary claim, and § 1367 is therefore inapplicable.

Tax returns and tax return information are presumed to be confidential under I.R.C. § 6103(a). An exception to the presumption of confidentiality is I.R.C. § 6103(e)(1)(D)(iii), which provides:

> (e) Disclosure to persons having material interest. –
>
> (1) In general. – The return of a person shall, upon written request, be open to inspection by or disclosure to –
>
> (D) in the case of the return of a corporation or a subsidiary thereof –
>
> (iii) any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation.

Yorkshire was a more than one percent Keller shareholder. Under the plain language of § 6103(e)(1)(D)(iii), if Keller had filed separate tax returns, Yorkshire unquestionably would have been entitled to their disclosure. This conclusion is undisputed. However, Keller filed consolidated tax returns under I.R.C. § 1501 and not separate tax returns.

Under § 1501, an affiliated group of corporations is privileged to file a consolidated tax return in lieu of each corporation filing separate tax returns. I.R.C. § 1501. The consent of all the affiliated corporations is required before such a consolidated tax return may be filed. *Id.* The affiliated group must have a common parent corporation, and certain stock ownership requirements must be met. *Id.* § 1504. When filing a consolidated tax return, the tax is determined on a consolidated basis, and a single

consolidated tax return is filed on behalf of all the members by the common parent corporation. *See* Treas. Reg. § 1.1502-75(h)(1). Whether a member of an affiliated group should elect to file a consolidated tax return depends upon a variety of complex and competing factors. Boris I. Bittker & James S. Eustice, *Federal Taxation of Corporations and Shareholders* ¶ 15.23 (5th ed. 1987). The principal advantages of consolidation are the following:

> (1) Operating losses of an affiliate can be offset against profits of other members of the group; (2) certain intercorporate distributions can be received tax-free from other members of the group . . . ; and (3) gain or loss on certain intercompany transactions is deferred . . . until realized outside the group or by virtue of certain triggering events.

Id.

Keller's choice to file consolidated tax returns for the years 1987 through 1990 creates a dilemma when applying § 6103. Yorkshire is entitled to disclosure of Keller's consolidated tax returns, but such disclosure also has the effect of disclosing the otherwise confidential tax returns of every other member of the affiliated group. S&P argues that this latter effect is unacceptable. It asserts that its right to tax return confidentiality trumps Yorkshire's right to disclosure of Keller's tax returns – that Yorkshire's right is nothing "more than a gratuitous accommodation by the government, of no importance to income reporting and revenue collection." We disagree.

Tax return confidentiality may be "grounded in the interest of the government in full disclosure of all the taxpayer's income which thereby maximizes revenue,"

Federal Sav. & Loan Ins. Corp. v. Krueger, 55 F.R.D. 512, 514 (N.D. Ill. 1972), but this does not render a shareholder's right to receive disclosure of corporate tax returns a mere gratuity. Congress meant to afford tax return disclosure to those with a material interest, and it specifically designated shareholders of more than one percent of a corporation as having such a material interest. *See* I.R.C. § 6103(e)(1)(D)(iii); *Crown Cork & Seal Co. v. Pennsylvania Human Relations Comm'n*, 463 F. Supp. 120, 122-23 (E.D. Pa. 1979). S&P's bald-faced assertion that tax return confidentiality is the predominant policy underlying § 6103 is insufficient to strip Yorkshire of her right to disclosure of Keller's tax returns.

[2] Simply put, S&P's decision to file consolidated tax returns was made for its own convenience and financial benefit, and Yorkshire's right to disclosure of Keller's tax return is not sacrificed thereby. Indeed, filing consolidated tax returns is a privilege that required the consent of S&P, Keller and the rest of the affiliated group. Accordingly, we affirm the district court's order of disclosure of Keller's consolidated tax returns for the years 1987 through 1990.

III. Disclosure of the Pearl-Falstaff Tax Return

Yorkshire argues that the district court erred in holding that she was not entitled to disclosure of the 1989 tax return of Pearl-Falstaff, a partnership owned by S&P subsidiaries Pearl Brewing and Falstaff Brewing. Yorkshire's argument is premised on her right as a one percent Keller shareholder to disclosure of the affiliated group's consolidated tax return. She claims that the Pearl-

Falstaff tax return was "a supplement to"[5] or "return information of"[6] the affiliated group's consolidated tax return, and that as such, she is entitled to its disclosure.[7] We disagree.

Every partnership is required to file a tax return for each taxable year. I.R.C. § 6031. A partnership's tax return "shall state specifically the items of partnership gross income and the deductions allowable by subtitle A of the code and shall include the names and addresses of all the partners and the amount of distributive share of income, gains, loss, deduction, or credit . . . allocated to each

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[5] Under I.R.C. § 6103(b)(1), a "return" is defined as:

> [A]ny tax or information return, declaration of estimated tax, or claim for refund required by . . . the provisions of [the I.R.C.] which is filed with the [I.R.S.] by, on behalf, of or with respect to any person, *and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.*

(Emphasis added).

[6] Under I.R.C. § 6103(b)(2)(A), "return information" is defined as:

> [A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the tax payer's return was, is being, or will be examined or subject to other investigation or processing, *or any other data, recorded by, prepared by, furnished to, or collected by the [I.R.S.] with respect to a return. . . .*

(Emphasis added).

[7] Whether Yorkshire is entitled to disclosure of the Pearl-Falstaff tax return under I.R.C. § 6103 is a question of statutory construction reviewed de novo. *See Williamson*, 974 F.2d at 1529.

partner. Treas. Reg. § 1.6031-1(a)(1). "[A]ny person who was a member of [a] partnership during any period covered by [a partnership's tax] return" is considered to have a "material interest" and is entitled to disclosure of the tax return. I.R.C. § 6103(e)(1)(C).

[3] In this case, however, Yorkshire is simply a one percent Keller shareholder. Although Keller owns approximately ninety-nine percent of the stock of General Brewing, which owns, in turn, approximately forty-five percent of the stock of Pearl Brewing, this fact makes neither Yorkshire nor Keller a Pearl-Falstaff partner. *See* I.R.C. § 761(b). In fact, absent consolidation, Yorkshire would not be entitled to disclosure of the tax return of Pearl Brewing, *see id.* § 6103(e)(1)(D), much less the tax return of Falstaff Brewing, a corporation in which Keller owns no interest and which is not a member of the affiliated group. As such, Yorkshire does not possess a "material interest" in the Pearl-Falstaff tax return under § 6103(e) like that which we found dispositive when affirming the district court's order of disclosure of Keller's consolidated tax returns. Any interest Yorkshire possesses in the Pearl-Falstaff tax return is merely derivative of her status as a one percent Keller shareholder and does not entitle her to disclosure.

[4] Yorkshire's attempt to avoid the necessity of having a "material interest" by characterizing the Pearl-Falstaff tax return as "a supplement to" or "return information of" the affiliated group's consolidated tax return is unpersuasive. Without a specific request under § 6103(e)(1)(C), a partnership is not even required to furnish its partners with a copy of the partnership's tax

return. Rather, the partnership need only furnish its partners with a partnership statement stating:

> (i) *The partner's distributive share* of partnership income, gain, loss, deduction, or credit required to be shown on the partnership return . . . ; and
>
> (ii) To the extent provided by form or the accompanying instructions, *any additional information that may be required to apply particular provisions of subtitle A of the [I.R.C.] to the partner with respect to items related to the partner.*

Temp. Treas. Reg. § 1.6031(b)-1T(a)(3)(i), (ii) (emphasis added). It stands to reason that if Pearl-Falstaff's tax return is not necessary for the filing of its partner's individual tax returns, it is not "a supplement to" or "return information of" Keller's consolidated tax return. Therefore, we affirm the district court's order enjoining the I.R.S. from disclosing to Yorkshire the 1989 tax return of Pearl-Falstaff.

CONCLUSION

The magistrate judge properly granted S&P leave to intervene under Federal Rule of Civil Procedure 24(a). Also, under I.R.C. § 6103, the district court properly ordered disclosure of Keller's consolidated tax returns for the years 1987 through 1990 to Yorkshire, and properly enjoined disclosure of the 1989 tax return of Pearl-Falstaff.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANALEE YORKSHIRE, Plaintiff-Appellee, v. UNITED STATES INTERNAL REVENUE SERVICE, Defendant-Appellee, v. S & P COMPANY, Intervenor-Appellant.	NO. 93-55835 D.C. NO. CV-92-06253-MRP
ANALEE YORKSHIRE, Plaintiff-Appellant, v. UNITED STATES INTERNAL REVENUE SERVICE, Defendant-Appellee, and S & P COMPANY, Intervenor-Appellee.	NO. 93-55932 D.C. NO. CV-92-06253-MRP **ORDER** (Filed Jul. 11, 1994)

BEFORE: TANG, PREGERSON, and NOONAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANALEE YORKSHIRE, Plaintiff, v. INTERNAL REVENUE SERVICE, Defendant.	NO. CV 92-6153-MRP(Ex) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE AND GRANTING CERTAIN RELIEF REQUESTED IN PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
S&P COMPANY, Intervenor.	

(Filed June 7, 1993)

(Entered June 14, 1993)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the complaint and all other papers on file, along with the attached Report and Recommendation of United States Magistrate Judge.

IT IS ORDERED that: (1) the Report and Recommendation of the Magistrate Judge is approved; and (2) the same is adopted as the findings of fact and conclusions of law herein; and (3) the parties shall proceed as follows:

(a) Within ten (10) days after entry of this order, Defendant shall provide Plaintiff with S&P Company's consolidated tax returns for the years 1987 through 1990;

(b) Within forty-five (45) days after expiration of this ten day period, Defendant shall process any nonexempt portions of the administrative file pertaining to S&P Company's consolidated tax returns for the years 1987 through 1990;

(c) Thereafter, upon submission of an affidavit executed by Plaintiff verifying Plaintiff's continuing status as a one percent shareholder of Keller Street Development Company, Defendant immediately shall release the nonexempt portions to Plaintiff;

(d) Thereafter, Plaintiff and Defendant shall confer to determine whether Plaintiff seeks access to any documents or portions of documents for which Defendant may claim an exemption; and, if so, whether an itemized index of documents will be required to adjudicate any exemption claims;

(e) Thereafter, if Plaintiff seeks access to any material claimed by Defendant to be exempt and requests an index of documents, within thirty (30) days Defendant shall produce an index which substantially comports with the requirements set forth in *Weiner v. Federal Bureau of Investigation*, 743 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992); and

(f) The time for filing summary judgment motions for resolution of any possible exemption claims shall be extended from the current deadline of June 22, 1993 until December 22, 1993.

IT IS FURTHER ORDERED that the Clerk serve a copy of this Order on counsel for all parties.

DATED: June 7, 1993.

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF(S)	CASE NUMBER
ANALEE YORKSHIRE,	CV 92-6153-MRP(Ex)
vs.	
DEFENDANT(S)	NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND LODGING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
INTERNAL REVENUE SERVICE,	(Filed May, 19, 1993)

TO: All Parties of Record
(see attached page)

You are hereby notified that pursuant to the Local Rules Governing Duties of Magistrate Judges, the Magistrate Judge's report and recommendation has been filed and proposed findings of fact and conclusions of law have been lodged on May 19, 1993, copies of which are attached.

Any party having objections to the report and recommendation and proposed findings of fact and conclusions of law and proposed judgment shall, not later than 10 days after service upon him, file and serve a written statement of objections with points and authorities in support thereof before the Honorable Charles E. Eick U.S. Magistrate Judge. No response to any objections will be received.

Failure to so object within the time limit specified shall be deemed a consent to the recommendation and a waiver of any appeal. Upon receipt of objections, or upon the lapse of the time for filing objections, the case will be submitted to the District Court Judge for disposition. Following entry of judgment, all motions or other matters in the case shall be filed to be considered and determined by the District Court Judge.

The Report and Recommendation of Magistrate Judge is not a final appealable order. A Notice of Appeal pursuant to Federal Rules of Appellate Procedure 4 (a) (1) should not be filed until entry of the District Court's judgment.

Dated: May 19, 1993

CLERK,
UNITED STATES
DISTRICT COURT

By /s/ Stacey Adams
Deputy Clerk

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OF PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 5/21/93

/s/ Stacey Adams
Deputy Clerk

NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND LODGING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANALEE YORKSHIRE, Plaintiff, v. INTERNAL REVENUE SERVICE, Defendant.	No. CV 92-6153-MRP(Ex) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE AND GRANTING CERTAIN RELIEF REQUESTED IN PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Lodged May 19, 1993) (Proposed by Magistrate Judge)
S&P COMPANY, Intervenor.	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the complaint and all other papers on file, along with the attached Report and Recommendation of United States Magistrate Judge.

IT IS ORDERED that: (1) the Report and Recommendation of the Magistrate Judge is approved; and (2) the same is adopted as the findings of fact and conclusions of law herein; and (3) the parties shall proceed as follows:

(a) Within ten (10) days after entry of this order, Defendant shall provide Plaintiff with S&P Company's consolidated tax returns for the years 1987 through 1990;

(b) Within forty-five (45) days after expiration of this ten day period, Defendant shall process any nonexempt portions of the administrative file pertaining to S&P

Company's consolidated tax returns for the years 1987 through 1990;

(c) Thereafter, upon submission of an affidavit executed by Plaintiff verifying Plaintiff's continuing status as a one percent shareholder of Keller Street Development Company, Defendant immediately shall release the non-exempt portions to Plaintiff;

(d) Thereafter, Plaintiff and Defendant shall confer to determine whether Plaintiff seeks access to any documents or portions of documents for which Defendant may claim an exemption; and, if so, whether an itemized index of documents will be required to adjudicate any exemption claims;

(e) Thereafter, if Plaintiff seeks access to any material claimed by Defendant to be exempt and requests an index of documents, within thirty (30) days Defendant shall produce an index which substantially comports with the requirements set forth in *Weiner v. Federal Bureau of Investigation*, 743 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992); and

(f) The time for filing summary judgment motions for resolution of any possible exemption claims shall be extended from the current deadline of June 22, 1993 until December 22, 1993.

IT IS FURTHER ORDERED that the Clerk serve a copy of this Order on counsel for all parties.

DATED: ___, 1993.

MARIANA R. PFAELZER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANALEE YORKSHIRE, Plaintiff, v. INTERNAL REVENUE SERVICE, Defendant. S&P COMPANY, Intervenor.	No. CV 92-6153-MRP(Ex) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed May 19, 1993)

This Report and Recommendation is submitted to the Honorable Mariana R. Pfaelzer, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

After exhausting administrative remedies, Plaintiff filed a Freedom of Information Act complaint against Defendant Internal Revenue Service ("IRS"). Plaintiff seeks to compel the IRS to disclose to Plaintiff: (1) the income tax returns of S&P Company for the years 1987 through 1990; and (2) the 1989 income tax return of the Pearl-Falstaff joint participation ("Pearl-Falstaff"). Defendant IRS and Intervenor S&P Company ("S&P") have answered the complaint.

All parties have moved for total or partial summary judgment. Following briefing, the Court heard oral argument on May 13, 1993.

UNCONTROVERTED FACTS

Plaintiff owns 1.07% of the outstanding shares of Keller Street Development Company ("Keller"). Plaintiff inherited these shares upon her mother's death in 1981.

S&P owns approximately 95% of the stock of Keller. Keller owns approximately 99% of the stock of General Brewing Company. General Brewing Company owns 45% of the stock of Pearl Brewing Company ("Pearl"). S&P owns the other 55% of the stock of Pearl. Pearl owns, either directly or through its wholly owned subsidiary Pearl Container Company, approximately 95% of Pearl-Falstaff. Pearl-Falstaff was a partnership between S&P subsidiaries Pearl and Falstaff Brewing Corporation.

S&P, Keller, General Brewing Company, Pearl and Pearl Container Company filed consolidated federal income tax returns for the years 1987 through 1990 ("the consolidated returns"). Pearl-Falstaff filed a federal income tax return for 1989 ("the partnership return").

Plaintiff previously filed suit against Keller in state court. In this state action, Plaintiff seeks to compel the dissolution of Keller, alleging various abusive practices by the management of Keller and S&P.

BACKGROUND AND SUMMARY OF PARTIES' CONTENTIONS

Section 6103 of Title 26 ("section 6103") "governs the confidentiality and disclosure of tax returns and return information. It provides that returns and return information may not be disclosed except as authorized by title 26." *Martin v. IRS*, 857 F.2d 722, 724 (10th Cir. 1988). Section 6103 states in pertinent part:

> (e)(1) The return of a person shall, upon written request, be open to inspection by or disclosure to . . .
>
> (C) in the case of the return of a partnership, any person who was a member of such partnership during any part of the period covered by the return;
>
> (D) in the case of the return of a corporation or a subsidiary thereof . . . (iii) any bona fide shareholder of record owning 1 percent or more of the outstanding shares of such corporation . . . "

Plaintiff contends section 6103 requires disclosure to her of the consolidated returns and the partnership return.[1] The IRS does not oppose disclosure of the consolidated returns, but does oppose disclosure of the partnership return. S&P opposes disclosure of any part of the consolidated returns or the partnership return.

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[1] Plaintiff's actual F.O.I.A. requests sought more than the returns. The requests sought the administrative files pertaining to the returns. The IRS and Plaintiff have agreed that the IRS may reserve its right to claim exemptions for portions of the administrative files other than the returns ("Stipulation, etc.," filed April 13, 1993).

APPLICABLE STANDARD

The Court must render summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked . . . the court . . . shall if practicable . . . make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just." Fed. R. Civ. P. 56(d).

An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. *Id.* at 248. Inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

I. Section 6103 Requires Disclosure to Plaintiff of the Consolidated Returns.

Plaintiff is a "bona fide shareholder of record owning 1 percent or more of the outstanding shares" of Keller. 26 U.S.C. § 6103(e)(1)(D)(iii). She inherited these shares more than ten years ago; she did not acquire these shares as a ruse to gain access to Keller's tax information.

S&P argues vaguely that Plaintiff is not a bona fide shareholder because she seeks the tax return information for an "improper purpose." It is unclear whether section 6103 requires examination of the purpose for which disclosure is sought. One court has held that the bona fide shareholder provision in section 6103 "is consistent with and reflects the common law right of a stockholder to inspect corporate records . . . ". *Kirk v. First National Bank*, 76-2 U.S. Tax Cas. (CCH) ¶ 9639 (N.D. Ga. 1976). Some courts at common law abridged a shareholder's right to inspect corporate records where the shareholder sought inspection for an improper purpose. *See generally*, 15 A.L.R. 2d 11, *et seq.* However, some courts also have held that, where a shareholder's right to inspect corporate records is provided by statute, the right is absolute, regardless of the purpose of the inspection. *See, e.g., Bernert v. Multnomah Lumber & Box Co.*, 119 Or. 44, 247 P. 155, 156 (1926); *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 P. 702, 704 (1917); *Kimball v. Dern*, 39 Utah 181, 116 P. 28, 30-33 (1911).

This Court assumes, *arguendo*, that demonstration of an "improper purpose" would bar Plaintiff from the relief she seeks. However, there is no evidence Plaintiff seeks disclosure of the tax information for an improper purpose. At common law, shareholders were entitled to inspect corporate books and records "though their only object [was] to ascertain whether their affairs [had] been properly conducted by the directors or managers." *Guthrie v. Harkness*, 199 U.S. 148, 154 (1905) (citations and quotations omitted); *accord Taylor v. Eden Cemetery Co.*, 337 Pa. 203, 10 A.2d 573 (1940). Even proof that Plaintiff intends to use the subject information to the detriment of

S&P or Keller in the pending state action would not establish an improper purpose. *See, e.g., Bernert v. Multnomah Lumber & Box Co.*, 119 Or. 44, 247 P. 155, 157-58, 248 P. 156 (1926); *Kimball v. Dern*, 39 Utah 181, 116 P. 28, 33-34 (1911); *see also Osmond v. Sanitary Co.*, 21 Pa. D&C 24 (1934).

S&P argues that, even if Plaintiff ordinarily would be entitled to see Keller's tax returns, the commingling of Keller's tax information with the tax information of S&P and other related entities precludes Plaintiff from seeing any part of the consolidated returns.[2] This argument finds no support in statute, case law or probable congressional intent.

Section 6103 expressly states that a 1% shareholder of a corporation is entitled to disclosure of the corporation's tax return. The statute does not state that a 1% shareholder of a corporation is entitled to disclosure of the corporation's tax return, except when the corporation files a consolidated return.

No published decision specifically addresses the disclosure or non-disclosure of consolidated returns under section 6103. However, it appears improbable Congress intended to empower a corporation to secrete its tax information from bona fide shareholders merely by filing a consolidated return. *See generally In re Southwest Aircraft Services, Inc.*, 831 F.2d 848, 852-53 (9th Cir. 1987), *cert.*

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[2] No evidence suggests Keller's tax information could be excised from the consolidated returns. By their nature, consolidated returns combine and commingle transactional and other financial information relating to all of the entities for which the returns are filed.

denied, 487 U.S. 1206 (1988) (courts should interpret ambiguous statutes to avoid reaching absurd or inequitable results). The IRS' "Disclosure of Official Information Handbook" buttresses this Court's interpretation of section 6103:

> "If a corporation has filed a consolidated return which includes the return of the subsidiary, the entire return and return information is the return or return information of the subsidiary." Disclosure of Official Information Handbook, § 240(1)(e)(2).

S&P argues Plaintiff can obtain or has obtained the information contained in the consolidated returns through alternative means. In F.O.I.A. actions, courts need not examine whether the information sought is available through alternative means. *See Department of Justice v. Tax Analysts*, 492 U.S. 136, 151-55 (1989) (public availability of information sought by F.O.I.A. request is irrelevant).

S&P argues section 6103 violates S&P's federal constitutional right of privacy. The federal constitutional right of privacy is extremely narrow. The right is limited to those personal rights which are "fundamental" or "implicit in the concept of ordered liberty." *Paul v. Davis*, 424 U.S. 693, 712-13 (1976); *see also Roe v. Wade*, 410 U.S. 113 (1973). A parent corporation's interest in the confidentiality of a consolidated tax return does not implicate the federal constitutional right of privacy.

S&P argues section 6103 violates the right of privacy recognized in the California Constitution. The Supremacy Clause dooms this argument to failure. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991) ("As long as it is

acting within the powers granted it under the [federal] Constitution, Congress may impose its will on the States"); *Tennoco, Inc. v. Sutton*, 530 F. Supp. 411, 433 (M.D. La. 1981) (articles of a state constitution "which interfere with, or are contrary to the laws of Congress, made in pursuance of the [federal] constitution are invalid under the Supremacy Clause").

II. Section 6103 Forbids Disclosure to Plaintiff of the Partnership Return.

Section 6103 authorizes disclosure of partnership returns to partners. 26 U.S.C. § 6103(e)(1)(C). Plaintiff is not now, and never has been, a partner in the Pearl-Falstaff partnership.

Contrary to Plaintiff's arguments, the partnership return was neither a "supplement" to or "data received" "with respect to" the consolidated returns. *See* 26 U.S.C. § 6103(b)(1) and (2). Partnerships are distinct entities, required to file separate returns. 26 C.F.R. § 1.6031-1. The fact that tax information concerning S&P or related entities may have been reflected in or affected by tax information in the partnership return is irrelevant.

> "[W]e agree with the IRS that the mere fact that information supplied by one person may affect the tax liability of another is insufficient to give the second the right to see that information. . . . It is frequently the case that one transaction is reflected in many tax returns." *Martin v. IRS*, 857 F.2d 722, 726 (10th Cir. 1988).
>
> "The ultimate issue under section 6103(e), is not what the disputed document shows regarding plaintiff's connection with, or general interest

in, certain entities, but whether plaintiff was in fact . . . a member of a particular partnership . . . ". *Britt v. IRS*, 79-2, U.S. Tax Cas. (CCH) ¶ 9450 (D.D.C. 1979).

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) granting relief consistent with this Report and Recommendation.

DATED: May 19, 1993.

/s/ Charles F. Eick
Charles F. Eick
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

Supreme Court, U.S.
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No. 94-611

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OCTOBER TERM, 1994

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vs.
ANALEE YORKSHIRE and
INTERNAL REVENUE SERVICE,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

On June 14, 1993, District Judge Mariana Pfaelzer ordered the Internal Revenue Service ("IRS") to produce to Analee Yorkshire the consolidated tax returns and tax return information of S&P Company, the parent corporation of Keller Street Development Company, in which Ms. Yorkshire is a minority shareholder. Ms. Yorkshire had requested these materials under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). The District Court's ruling was affirmed by the Ninth Circuit on June 8, 1994. S&P now petitions this Court for a writ of

certiorari. Ms. Yorkshire objects.[1]

ARGUMENT[2]

There is no reason to grant certiorari in this case. The case does not present any issues of constitutional law and is not in conflict with the opinions of the Supreme Court or any Circuit Court. This case involves the interplay of 26 U.S.C. § 6103(e)(1)(D)(iii), which grants a 1% shareholder of a corporation access to the corporate tax return, with the consolidated return provisions of the Internal Revenue Code, 26 U.S.C. § 1501, *et seq.*, and it is the *only* reported case ever to consider this issue.

S&P claims that the Ninth Circuit's opinion conflicts with *Church of Scientology of California v. Internal Revenue Service*, 482 U.S. 9 (1987), and various Circuit Court opinions. There is no such conflict. All of the cases cited by S&P stand for the proposition that tax returns are confidential unless there is an applicable exception. There is nothing in that proposition which conflicts with an opinion, such as the Ninth Circuit's opinion herein, that interprets the scope of one of the statutorily created exceptions.

---

[1] The arguments set forth herein are substantially identical to the arguments made by Ms. Yorkshire in response to S&P's application to Justice O'Connor for a stay pending disposition of the petition for a writ of certiorari. Justice O'Connor denied the application for stay on October 24, 1994.

[2] Ms. Yorkshire has no objection to the portions of S&P's petition entitled "Questions Presented," "Opinions Below," "Jurisdiction," "Constitutional and Statutory Provisions Involved," and "Statement of the Case."

S&P also errs in its contention that the Ninth Circuit's opinion conflicts with the language in Section 6103(e)(1)(D)(iii) authorizing shareholders of a parent corporation to obtain access to a subsidiary's tax return. There is nothing inconsistent between (A) the statutory provision allowing "downward" access for shareholders regardless of whether a consolidated return is filed and (B) the Ninth Circuit's holding allowing "upward" access for shareholders only when a consolidated return is filed.

S&P also errs in arguing that the Ninth Circuit is mistaken in its reasoning. As recognized by the Ninth Circuit and the District Court, the key analytical point in harmonizing Section 6103(e)(1)(D)(iii) with Section 1501, *et seq.*, is that the filing of a consolidated return is elective. A parent corporation that wishes to prevent a minority shareholder of a subsidiary from having access to the parent's tax information can simply elect not to file a consolidated return. While this may cause the parent corporation not to elect a legal tax minimization strategy, the Internal Revenue Code is replete with elections for which a taxpayer has to take into account countervailing considerations. For example, a corporation considering the election of "Subchapter S" status has to weigh the legal avoidance of corporate tax against various restrictions on the ownership of stock. 26 U.S.C. §§ 1361(b) and 1363(a). Acceptance of S&P's analysis of Section 6103 would eviscerate Ms. Yorkshire's statutory right of access to Keller Street's tax return solely because S&P elected to file a consolidated return.

CONCLUSION

For the reasons set forth above, this Court should deny S&P's petition for a writ of certiorari.

DATED: October 28, 1994.

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